

SAEID MOHEBBI,

Plaintiff,

V.

MAHNAZ KHAZEN, et al.,

Defendants.

Case No. 13-cv-03044-BLF

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
APPLICATION FOR ENTRY OF
STIPULATED JUDGMENT**

[Re: ECF 129-1]

Before the Court is Plaintiff Saeid Mohebbi’s Application for Entry of Stipulated Judgment Pursuant to Comprehensive Settlement, Release and Security Agreement (“Application”). Application, ECF 129-1. Defendants Mahnaz Khazen, Michael Shadman and U.S. Immigration Investment Center, LLC (collectively, “Defendants”) oppose Plaintiff’s Application. Opp’n, ECF 135. The present Application concerns whether Plaintiff is entitled to entry of the stipulated judgment arising out of Defendants’ failure to make timely payment under the parties’ settlement agreement and what monetary award Plaintiff would be entitled.

The Court held a hearing (“the Hearing”) on Plaintiff’s Application for Stipulated Judgment on December 13, 2018. The Court has considered the arguments presented at the Hearing and in the briefing, as well as the evidence submitted and applicable law. For the reasons that follow and as discussed at the Hearing, the Court hereby **GRANTS IN PART** and **DENIES IN PART** Plaintiff’s Application for Stipulated Judgment.

I. BACKGROUND

A. General Background

The underlying facts of this case are well-known¹ to the Court and the parties and such

¹ For example, see the Court's prior orders at ECF 64 and ECF 81.

1 facts not relevant to the present Application for Stipulated Judgment are not restated here. On July
2 11, 2014, Plaintiff Saeid Mohebbi (“Plaintiff” or “Mohebbi”) filed his Second Amended
3 Complaint (“SAC”) against Defendants Mahnaz Khazen, Michael Shadman, Violet Parvarandeh,
4 Pirooz Parvarandah, and Stacey Conti, as well as U.S. Immigration Investment Center LLC
5 (“USIIC”), USIIC LLP, and USIIC I LP, asserting twenty-two causes of action, including claimed
6 violations of federal and state securities laws, fraud, false advertising, conversion, unjust
7 enrichment, and common law torts. SAC, ECF 66. The claims arose out of a contractual
8 investment relationship between the parties. Plaintiff alleged that, in exchange for Defendants’
9 assistance in applying for a federal EB-5 immigration visa, he invested over \$1 million in a
10 partnership. *See, e.g.*, SAC ¶ 38. Plaintiff alleged that Defendants fraudulently induced this
11 investment and failed to comply with their obligations pursuant to the contract, and sought
12 rescission of the agreement and damages, including punitive damages, and attorneys’ fees. *See*
13 *generally* SAC.

14 **B. Arbitration Award**

15 On December 4, 2014, the Court granted in part Defendants’ motion to compel arbitration
16 and stayed the remaining claims pending completion of arbitration. *See* ECF 81. Arbitration
17 subsequently commenced in the International Court of Arbitration of the International Chamber of
18 Commerce before the Hon. James Ware (Ret.). *See generally Arbitration Partial Award*, Ex. 2 to
19 Holland Decl., ECF 129-3. On February 28, 2018, Judge Ware issued a Partial Award declaring
20 “[Plaintiff] Saeid Mohebbi to be the prevailing party as against [Defendants] Mahnaz Khazen,
21 Michael Shadman and [U.S.] Immigration Investment Center LLC.” *Id.* ¶ 335. Judge Ware ruled
22 that Defendants Khazen, Shadman, and USIIC were liable and awarded Mohebbi both
23 compensatory and punitive damages. *See id.* ¶¶ 326–29. Pre-award interest, attorney’s fees and
24 costs were reserved for the Final Award. *Id.* ¶ 337. Judge Ware’s findings included, *inter alia*,
25 that Defendant Khazen “made intentionally false representations to Claimant Mohebbi,” created
26 “fake” government documents to illegally receive funds out of Iran, “creat[ed] a false paper trail,”
27 made a variety of “documents [that] were all fictitious . . . to cover up [multiple]
misrepresentations,” engaged in a “cover-up” through the creation of a “fictitious investment,” and

1 “deliberately concealed from [] Mohebbi her actual use of his EB-5 funds.” *See id.* ¶¶ 148–49,
2 210, 246, 248.

3 **C. Settlement Agreement and Defendants’ Failure to Pay**

4 Prior to issuance of any Final Award, the parties² entered into a Comprehensive
5 Settlement, Release, and Security Agreement (“Settlement Agreement”), effective March 28,
6 2018. *See generally* Settlement Agreement, Ex. 2 to Holland Decl., ECF 120-1. The Settlement
7 Agreement is governed by California law, *see id.* § 12, and conditionally resolves all disputes
8 between the parties as alleged in this action or the arbitration proceeding, *see id.* § A–E, § 1.
9 Pursuant to the agreement, Defendants Khazen, Shadman, and USIIC agreed “to pay or cause to
10 paid to [] Mohebbi . . . by [] September 28, 2018, the discounted sum of **Three Million, Six**
11 **Hundred Twenty Five Thousand Dollars and No Cents** (\$3,625,000.00 U.S.) (the ‘**Settlement**
12 **Amount**’).” *Id.* § 2.1 (emphasis in original). The Settlement Agreement further provides that the
13 Court may “enter the Stipulated Judgment attached as Exhibit F [to the Settlement Agreement]” if
14 the “full Settlement Amount, and all accrued interest, if any, is not paid with[in] the [] period
15 specified.” *See id.* § 5.1(b). The Settlement Agreement also provides that “[Plaintiff] may
16 immediately foreclose on the security referred to [in the Settlement Agreement], which
17 Defendants shall not oppose, directly or indirectly,” if the full Settlement Amount is not paid
18 within the period specified. *See id.* § 5.2.

19 Defendants made an initial settlement payment of \$500,000 to Plaintiff on June 11, 2018.
20 *See* Holland Decl. ¶ 54, ECF 129-3. The parties agree that no additional payments were made by
21 the deadline of September 28, 2018, but dispute who is at fault thus what actions should result
22 from Defendants’ failure to pay. *See* Application at 1, ECF 129-1; Opp’n at 6–7, ECF 135. On
23 October 19, 2018, Defendants made an additional settlement payment of \$1,212,350 to Plaintiff.
24 *See* Benning Decl. ¶ 6, ECF 136. The Settlement Agreement includes terms setting interest rates
25 and accrual on any outstanding amount on or after June 12, 2018. *See* Settlement Agreement

26
27 ² Defendant USIIC LLP is not listed in the Settlement Agreement; however, Plaintiff represents
28 that claims against all parties to this lawsuit are covered by the Settlement Agreement, *see*
Application at 1, ECF 129-1, which Defendant does not dispute.

1 § 2.1(c)–(g). The Settlement Agreement also states that if the full Settlement Amount is not paid
2 by the deadline of September 28, 2018, Plaintiff may apply to the Court to enter “the Stipulated
3 Judgment attached [see Exhibit F to the Settlement Agreement] . . . against Defendants [in] the
4 amount of 120% of any unpaid portion of the Settlement Amount that is then due and owing at the
5 time of default.” *See* Settlement Agreement § 5.1(b).

6 **D. On-going Litigation**

7 On September 29, 2018, the day after the settlement payment deadline, Plaintiff served
8 Defendants with a Notice of Default and indicated that Plaintiff would file an application for
9 stipulated judgment in accordance with the terms of the Settlement Agreement if Defendants did
10 not “cure the default” within “four court days” as provided by the procedure for entering stipulated
11 judgment. *See* Ex. 54 to Holland Decl., ECF 129-3. Defendants did not make any additional
12 payments within this timeframe, but instead filed an *Ex Parte* Application for Temporary
13 Restraining Order and Order to Show Cause Re: Preliminary Injunction (“Application for TRO”)
14 on October 3, 2018. *See* Application for TRO, ECF 112. Defendants’ Application for TRO
15 sought to enjoin Plaintiff from filing an application for stipulated judgment; enjoin Plaintiff from
16 foreclosing on the properties listed as “security” in § 3 of the Settlement Agreement; obtain an
17 order to show cause why a preliminary injunction should not issue; and obtain a finding of
18 damages for breach of contract and breach of the implied covenant of good faith and fair dealing,
19 and judicial declaration that § 5.1 of the Settlement Agreement is void and unenforceable. *See*
20 generally *id.* The properties listed as “security” are located at 143 Bay Place and 2332 & 2336
21 Harrison Street, Oakland, California (“The Properties”). *See id.* § 3.

22 On October 10, 2018, the Court denied Defendants’ Application for TRO in its entirety.
23 *See* Order Denying Defendants’ Application for TRO, ECF 130. Now before the Court is
24 Plaintiff’s Application for Entry of Stipulated Judgment Pursuant to Comprehensive Settlement,
25 Release and Security Agreement (“Application”). Application, ECF 129-1.

26 **II. LEGAL STANDARD**

27 Under federal law, courts possess inherent power to enforce a settlement agreement
28 pertaining to an action pending before it. *See Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir.

1 1978). “The authority of a trial court to enter a judgment enforcing a settlement agreement has as
2 its foundation the policy favoring the amicable adjustment of disputes and the concomitant
3 avoidance of costly and time consuming litigation.” *Id.* In other words, the district court “ha[s]
4 the authority to approve and enforce [a] settlement [agreement]” in a case pending before it. *See*
5 *Waits v. Weller*, 653 F.2d 1288, 1291 n.4 (9th Cir. 1981); *see also Sohn v. Wells Fargo Bank*,
6 2015 WL 13688050, at *2 (N.D. Cal. Oct. 13, 2015). Courts possess equivalent power under
7 California law. “If parties to pending litigation stipulate, in a writing signed by the parties outside
8 the presence of the court or orally before the court, for settlement of the case, or part thereof, the
9 court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by
10 the parties, the court may retain jurisdiction over the parties to enforce the settlement until
11 performance in full of the terms of the settlement.” Cal. Civ. Proc. Code § 664.6. Under § 664.6,
12 a court may “entertain challenges to the actual terms of the stipulation, that is, whether there
13 actually was a settlement [and] interpret the terms and conditions to settlement.” *Fiore v.*
14 *Alvord*, 182 Cal. App. 3d 561, 565–66 (1985).

15 **III. DISCUSSION**

16 The parties do not dispute that settlement occurred and is binding. Instead, the parties
17 dispute whether Plaintiff is entitled to Stipulated Judgment arising out of Defendants’ failure to
18 make timely payment under the Settlement Agreement and to what amount of damages Plaintiff
19 would be entitled. *See* Application at 1–2, ECF 129-1; Opp’n at 1, ECF 135. Specifically,
20 Plaintiff requests that the Court enter judgment for Plaintiff pursuant to the parties’ Stipulated
21 Judgment form (Ex. F to the Settlement Agreement), which includes confirming Judge Ware’s
22 Arbitration Award and awarding Plaintiff an additional 20% of the amount outstanding. *See*
23 Application at 1–2; Ex. F to Settlement Agreement at 1. Defendants object to the entry of
24 Stipulated Judgment on three grounds: (1) that Plaintiff’s alleged breaches of the confidentiality
25 clause of the Settlement Agreement caused Defendants to default; (2) that the Arbitration Award
26 should not be confirmed because it was not finalized; and (3) that the additional 20% provided in
27 the Stipulated Judgment form is void and unenforceable as a liquidated damages “penalty
28 provision.” *See* Opp’n at 1.

1 The Court discusses in turn each objection raised by Defendants. For the reasons stated
2 below, the Court finds that Defendants' first two objections are without merit but agrees that the
3 provision granting Plaintiff an additional 20% of the amount outstanding is void and
4 unenforceable. Accordingly, Plaintiff's Application for Stipulated Judgment is GRANTED IN
5 PART and DENIED IN PART.

6 **A. Plaintiff's Alleged Breaches of Confidentiality**

7 Defendants contend that "Plaintiff breached the confidentiality clause in the [Settlement]
8 Agreement" and that "[c]onsequently, Defendants have been unable to sell The Properties and
9 acquire liquid capital to tender payment to Plaintiff . . . rendering [Defendants] in default under the
10 [Settlement] Agreement." *See Opp'n at 8, 9.* Plaintiff argues that "[Plaintiff] has not breached the
11 Settlement Agreement's confidentiality clause and Defendants have offered no evidence of any
12 actual confidentiality breaches" and that regardless "any alleged confidentiality breaches are
13 irrelevant, as Defendants' performance is not excused." *See Plaintiff's Memorandum at 10, ECF*
14 129-2; *see also* Reply at 1–6, ECF 144. As discussed below, the Court agrees with Plaintiff.

15 First, Defendants' obligation under the Settlement Agreement to make timely payment of
16 the Settlement Amount is not contingent upon sale of The Properties. Instead, the Settlement
17 Agreement provides that The Properties are "security until payment [is made] to [Plaintiff] of the
18 full Settlement Amount and all accrued interest [] **or** [] shall be sold by Defendants . . . to generate
19 funds." Settlement Agreement § 3 (emphasis added); *see also id.* § 3.3. Thus, while Defendants
20 may sell The Properties and use the proceeds to cover the Settlement Amount, Defendants are
21 bound by the Settlement Agreement to pay the Settlement Amount irrespective of sale of The
22 Properties. In other words, mere non-sale of The Properties does not relieve Defendants of their
23 duty under the Settlement Agreement to make timely payment.

24 Second, Defendants' allegation that Plaintiff breached the confidentiality provisions of the
25 Settlement Agreement is based primarily on the declaration of Defendant Khazen, *see Opp'n at 6–*
26 11 (extensively citing Khazen Decl., ECF 137), which is rife with inadmissible hearsay. For
27 example, Khazen alleges that Plaintiff violated the confidentiality provisions based on what a first
28 individual told a second individual who then told Khazen. *See* Khazen Decl. ¶ 12. Khazen offers

1 numerous additional double hearsay or hearsay statements that are likewise inadmissible. *See,*
2 *e.g., id.* ¶¶ 19–21. Thus, the Khazen Declaration is not evidence that Plaintiff breached the
3 confidentiality provisions of the Settlement Agreement or that the alleged breaches caused
4 Defendants to default.

5 Third, even if Plaintiff did breach the confidentiality provisions, the Settlement Agreement
6 provides liquidated damages in the event “a Party breaches th[e] confidentiality provision” and
7 provides for no other damages or relief. *See* Settlement Agreement § 4.2. Therefore, the
8 exclusive remedy for breach of confidentiality is liquidated damages of “[\\$37,500.00] per
9 breach . . . if such an impermissible disclosure is proved.” *Id.* Here, Defendants have not proven
10 that Plaintiff breached the confidentiality provisions of the Settlement Agreement. Other than the
11 Khazen Declaration, Defendants point to a “Notice of Conditional Settlement” and “Notice of
12 Lien” disclosed by Plaintiff in a state court action. *See* Opp’n at 9. However, these documents are
13 simply ECF 105 and ECF 102, respectively, in the instant action. ECF 105 was publicly filed by
14 Plaintiff and Defendants jointly and ECF 102 was publicly filed by a third party and not objected
15 to by Defendants. Regardless, even if Defendants did show that Plaintiff breached the
16 confidentiality provisions, Defendants’ failure to make timely payment would not be excused as a
17 remedy for such breach. Accordingly, Defendants’ objection based on Plaintiff’s alleged breach
18 of the confidentiality provisions fails. Defendants also object to Stipulated Judgment on grounds
19 that Plaintiff breached the implied covenant of good faith and fair dealing; however, this alleged
20 breach is based on Plaintiff’s alleged breach of confidentiality, *see* Opp’n at 10–11, and thus fails
21 for the same reasons.

22 In sum, the Court rejects Defendants’ contention that Plaintiff’s alleged breach of
23 confidentiality precludes Stipulated Judgment for Plaintiff.

24 **B. Confirmation of the Arbitration Award**

25 Defendants argue that Plaintiff’s request to confirm Judge Ware’s Arbitration Award
26 should be denied because “[o]n March 16, 2018, Defendants filed [a] Correction, requesting
27 clarification and resolution on several significant portions of the Award, including the Arbitrator’s
28 conflicting findings of fraud and breach of contract.” *See* Opp’n at 14. This argument is without

1 merit. As pointed out by Plaintiff, *see* Reply at 11, Defendants affirmatively withdrew their
2 request for a “Correction” of the Arbitration Award on April 26, 2018, *see* Ex. 41 to Holland
3 Decl., ECF 129-3. In addition, confirmation of the Arbitration Award is a term of the Stipulated
4 Judgment form (Ex. F to the Settlement Agreement) that Defendants’ approved on March 28,
5 2018, as part of the Settlement Agreement. *See* Ex. F to Settlement Agreement at 1. Accordingly,
6 the Court grants Plaintiff’s request to confirm the Arbitration Award.

7 **C. Provision for an additional 20% in Damages**

8 Defendants contend that § 5.1(b) of the Settlement Agreement providing for “the amount
9 of 120% of any unpaid portion of the Settlement Amount that is then due and owing at time of
10 default”³ is a “penalty provision” in violation of California Civil Code § 1671. *See* Opp’n at 11.
11 Plaintiff argues that Civ. Code § 1671 does not void the 120% provision because the Settlement
12 Amount represents a “discounted” amount and that multiplying the “discounted” amount by 1.2 is
13 therefore not an “unenforceable penalty” but instead a reflection of “the undiscounted Settlement
14 Amount.” *See* Plaintiff’s Memorandum at 19–20. Plaintiff also argues that pursuant to Civ. Code
15 § 1671(b) Defendants have the burden of proving the 1.2 multiplier is “unreasonable under the
16 circumstances existing at the time the contract was made,” *see id.* at 20 (citing Civ. Code
17 § 1671(b)), and that Defendants have not met their burden, *see* Reply at 10. As discussed below,
18 the Court finds that under California case law interpreting Civ. Code § 1671, Defendants have met
19 their burden of showing “the provision was unreasonable under the circumstances existing at the
20 time” the Settlement Agreement was entered, *see* Civ. Code § 1671(b), and therefore holds that the
21 120% provision in the Settlement Agreement is unenforceable.

22 Civil Code § 1671 provides that “a provision in a contract liquidating the damages for the
23 breach of the contract is valid unless the party seeking to invalidate the provision establishes that
24 the provision was unreasonable under the circumstances existing at the time the contract was
25 made.” Civ. Code § 1671(b). The California Supreme Court has held that a “liquidated damages
26 clause will generally be considered unreasonable, and hence unenforceable under section 1671(b),
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³ And corresponding reference to this 1.2 multiplier in the Stipulated Judgment form.

1 if it bears no reasonable relationship to the range of actual damages that the parties could have
2 anticipated would flow from a breach.” *Ridgley v. Topa Thrift & Loan Ass’n*, 17 Cal. 4th 970, 977
3 (1998) (holding that the disputed provision was an unenforceable penalty for late payment of
4 interest). Instead, “[t]he amount set as liquidated damages must represent the result of a
5 reasonable endeavor by the parties to estimate a fair average compensation for any loss that may
6 be sustained.” *Id.* (internal quotation and citation omitted). Absent such a relationship, “a
7 contractual clause purporting to predetermine damages must be construed as a penalty.” *Id.*
8 (internal quotation and citation omitted). “The characteristic feature of a penalty is its lack of
9 proportional relation to the damages which may actually flow from failure to perform under a
10 contract.” *Id.* (internal quotation and citation omitted).

11 Defendants argue that the 120% provision does not represent “an actual measure of
12 damages” because “the liquidated damages clause remained at a constant 20%” during settlement
13 negotiations despite fluctuations in proposed settlement amounts. *See Opp’n* at 13. The Court
14 agrees. During settlement negotiations between the parties, the provision remained static at 120%
15 of the outstanding amount, despite the proposed settlement amount fluctuating from \$4,252,397.96
16 on February 28, 2018, to \$3,625,000.00 on March 8, 2018. *See Ex. 5 to Holland Decl.*, ECF 129-
17 3; *Ex. 7 to Holland Decl.*, ECF 129-3. This evidence demonstrates that the 120% provision is not
18 in proportion “to the damages which may actually flow” from Defendants’ failure to make timely
19 payment, *see Ridgley*, 17 Cal. 4th at 977, but that instead the provision is simply a flat rate on top
20 of the Settlement Amount. In other words, the amount of damages provided by the 120%
21 provision varied with the proposed settlement amounts during negotiations, without consideration
22 of “the range of actual damages that the parties could have anticipated would flow from [late
23 payment],” *see Ridgley*, 17 Cal. 4th at 977.

24 Under the February 28, 2018 proposed settlement amount the 120% provision would
25 provide \$850,479.59⁴ in liquidated damages for late payment, while under the March 8, 2018
26 proposed settlement amount the provision would provide \$725,000.00⁵ for identical breach. As
27

28 ⁴ \$4,252,397.96 x 0.20

⁵ \$3,625,000.00 x 0.20

1 the Settlement Agreement separately provides for enhanced interest on any outstanding amount in
2 the event of late payment, *see Ex. F to Settlement Agreement at 1–2*, it is simply not plausible
3 Plaintiff would suffer nearly \$125,000 in additional actual damages merely because Plaintiff had
4 obtained a larger settlement amount, *see Greentree Financial Group, Inc. v. Execute Sports, Inc.*,
5 163 Cal. App. 4th 495, 500 (2008) (“Damages for the withholding of money are easily
6 determinable—i.e., interest at prevailing rates.”) (internal quotation and citation omitted) (finding
7 that additional charge for failure to make payment was an unenforceable penalty).

8 As *Greentree* makes clear, it is impermissible to use a measure of damages based on the
9 entire underlying lawsuit to set liquidated damages for a narrower breach. 163 Cal. App. 4th at
10 499. The *Greentree* court explained that “the breach we are analyzing is the breach of the
11 *stipulation*, not the breach of the *underlying contract*.” *Id.* (emphasis in original). The *Greentree*
12 court therefore found that because the measure of damages for breach of the *stipulation* was based
13 on “damages in the underlying lawsuit,” that measure of damages “bears no reasonable
14 relationship to the range of actual damages the parties could have anticipated from a breach of the
15 *stipulation*.” *Id.* Here, like in *Greentree*, the 120% provision sets liquidated damages for late
16 payment based solely on the outstanding amount due under the Settlement Agreement at the time
17 of breach—the amount of damages in the underlying lawsuit—and likewise bears no reasonable
18 relationship to actual damages the parties could have anticipated from late payment. Thus, the
19 120% provision possesses the “characteristic feature of a penalty.” *Ridgley*, 17 Cal. 4th at 977.

20 Moreover, on February 28, 2018, Plaintiff referred to the proposed stipulated judgment for
21 120% of any outstanding amount as an “enforcement mechanism[] . . . for enforcement of the
22 settlement agreement if the Settlement Amount is not timely and fully paid.” *See Ex. 5 to Holland*
23 *Decl.*, ECF 129-3. This evidence supports Defendants’ contention that the provision is a “penalty
24 provision [that] operates to compel performance of an act and [] becomes effective only in the
25 event of default upon which a forfeiture is compelled without regard to the damages sustained by
26 the party aggrieved by the breach.” *Ridgley*, 17 Cal. 4th at 977.

27 In support of his theory that the 120% provision represents a permissible “discounted”
28 amount because multiplying the “discounted” amount by 1.2 reflects “the undiscounted Settlement

1 Amount,” see Plaintiff’s Memorandum at 19–20, Plaintiff cites two cases, *Jade Fashion & Co. v.*
2 *Harkham Industries*, 229 Cal. App. 4th 635 (2014) and *Weber, Lipshie & Co. v. Christian*, 52 Cal.
3 App. 4th 645 (1997). Neither is helpful to Plaintiff. *Jade Fashion* applied *Ridgley*’s “reasonable
4 relationship to the range of actual damages” test and found that a \$17,500 damages provision for
5 late payment was permissible under Civ. Code § 1671 because the amount “was [not] an
6 additional payment over and above any debt that was owed” but instead “the \$17,500 was part of
7 the [actual] \$341,628.77 debt.” See *Jade Fashion*, 229 Cal. App. 4th at 646, 649–50. In other
8 words, the damages provision was not a penalty but simply reflected the amount that Jade Fashion
9 “agreed to forebear [sic] on the immediate collection of the [d]ebt . . . on the condition that
10 [Harkham Industries] make installment payments [on schedule].” *Id.* at 649. The *Jade Fashion*
11 court emphasized that the \$17,500 was part of the debt actually owed “in both the Agreement and
12 the continuing guaranty.” *Id.*

13 Here, unlike in *Jade Fashion*, the 120% provision in the parties’ Settlement Agreement
14 does not reflect forbearance of an amount owed under the Settlement Agreement, but instead an
15 additional payment *on top of* the debt Defendants already owed Plaintiff. Accordingly, *Jade*
16 *Fashion* does not stand for Plaintiff’s proposition. Nor does *Weber*. *Weber* provides that if a
17 liquidated damages clause “is otherwise valid, [the court] will uphold it even if the parties have
18 referred to it as a penalty.” 52 Cal. App. 4th at 656. Here, as discussed above, the Court finds that
19 the 120% provision in the Settlement Agreement is not “otherwise valid” and thus *Weber* has no
20 effect.

21 Finally, at the Hearing, Plaintiff referred to an additional case, *Krechuniak v. Noorzoy*, 11
22 Cal. App. 5th 713 (2017). The Court has reviewed *Krechuniak* and does not find it persuasive for
23 Plaintiff. *Krechuniak* acknowledges *Ridgley*’s “reasonable relationship to the range of actual
24 damages” test and concerns the appellate standard of review of the trial court’s determination of
25 whether a contract provision is an illegal penalty or an enforceable liquidated damages clause. See
26 *Krechuniak*, 11 Cal. App. 5th at 714, 722. *Krechuniak* concluded that appellant was precluded
27 from arguing on appeal that the settlement agreement contained an invalid penalty provision
28 because appellant did not make that argument before the trial court. See *id.* at 726–27. Thus,

1 *Krechuniak* does not save the day for Plaintiff.

2 In sum, Plaintiff's Application for Stipulated Judgment is denied to the extent it
3 incorporates the 120% provision set forth in § 5.1(b) of the Settlement Agreement.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiff's Application for Stipulated Judgment is GRANTED
6 IN PART and DENIED IN PART. It is hereby ordered that:

- 7 1. The Arbitration Award is confirmed.
8 2. Plaintiff is entitled to Stipulated Judgment (Ex. F to the Settlement Agreement) except
9 the 120% provision set forth in the Stipulated Judgment form and the Settlement
10 Agreement shall not apply.
11 3. The parties shall jointly provide a written stipulation and proposed judgment to the
12 Court **no later than January 22, 2019**, that reflects the total amount owed to Plaintiff
13 up to the date of the proposed judgment, including interest, in accordance with this
14 Order.

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16 **IT IS SO ORDERED.**

17 Dated: January 9, 2019



18
19 BETH LABSON FREEMAN
20 United States District Judge

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